

Message Text

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TO SECSTATE WASHDC PRIORITY 432

LIMITED OFFICIAL USE SECTION 1 OF 2 ROME 8747

E.O. 11652: GDS

TAGS: PINS, ETRN PFOR

SUBJECT: CIVAIR: ROME CONFERENCE/ASSEMBLY

PLEASE PASS TO: LITTELL/CAB; DRISCOLL/DOT; STEWARD/FAA

1. FOR DEPT INFO, FOLLOWING IS OUTLINE OF THE
LEGAL BRIEF DEVELOPED BY US DEL FOR USE AS APPROPRIATE
IN OPPOSING ANY PUNITIVE ICAO ACTION AGAINST ISRAEL:

I. ASSEMBLY RESOLUTION CONDEMNING ISRAEL

THE UNITED STATES ANTICIPATES AN INITIATIVE CALLING
FOR THE ASSEMBLY OF ICAO TO ADOPT A RESOLUTION CONDEMNING
THE ISRAELI ACTION OF AUGUST 10. THE U.S. WISHES TO
EMPHASIZE THE FOLLOWING POINTS WITH RESPECT TO THIS
INITIATIVE:

A. THERE HAVE ALREADY BEEN RESOLUTIONS ADOPTED BY
THE UNITED NATIONS SECURITY COUNCIL AND THE COUNCIL OF
ICAO. ANY RESOLUTION ADOPTED BY THE ASSEMBLY SHOULD BE
REITERATIVE OF THE SUBSTANCE OF THOSE RESOLUTIONS. THE
SECURITY COUNCIL AFTER LENGTHY DELIBERATION ADOPTED
RESOLUTIONS THAT BALANCED THE ISSUES AND STRUCK A
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POSITIVE NOTE, AS DID THE ICAO COUNCIL.

B. SIGNIFICANTLY, BOTH RESOLUTIONS WERE ADOPTED WITHOUT
OBJECTION. THIS ENCOURAGING DISPLAY OF WORLD
SOLIDARITY WAS MADE POSSIBLE BY CLOSE COOPERATION

BETWEEN THE PROPONENTS OF THE RESOLUTIONS AND THE REPRESENTATIVES ON THE COUNCIL. IT WOULD BE REGRETTABLE IF THE ASSEMBLY OF ICAO WOULD BE CALLED UPON TO ADOPT A RESOLUTION THAT COULD NOT BE ACCEPTED BY CONSENT. THEREFORE, IT IS THE HOPE AND DESIRE OF THE U.S. THAT ANY RESOLUTION CONDEMNING THE DEPLORABLE ISRAELI ACTION WILL BE BROADLY CIRCULATED BEFORE FORMAL INTRODUCTION IN AN EFFORT TO REACH A CONSENSUS.

C. BOTH COUNCILS' RESOLUTIONS POINTED TOWARD POSITIVE LAW-MAKING ACTION FOR ICAO TO CONSIDER. WHILE A CONDEMNATION OF THE ISRAELI ACTION IS JUSTIFIED, ICAO CAN BETTER SAFEGUARD CIVIL AVIATION BY DETERRING SIMILAR ACTION BY ANY STATE IN THE FUTURE. THUS ICAO SHOULD GO BEYOND ANY CONDEMNATION AND WORK WITHIN THE FRAMEWORK OF THE CHICAGO CONVENTION AND CUSTOMARY INTERNATIONAL LAW TO DEVELOP POSITIVE LAW MAKING.

II. ACTION IN THE ICAO ASSEMBLY TO SANCTION ISRAEL

THE UNITED STATES IS UNEQUIVOCALLY OPPOSED TO THE APPLICATION OF SANCTIONS AGAINST ISRAEL AT THIS TIME. ALTHOUGH THE UNITED STATES HAS CONDEMNED THE ISRAELI ACT OF AUGUST 10 WE STRONGLY BELIEVE THAT LAW-MAKING SHOULD BE DIRECTED AT FUTURE INCIDENTS, BE APPLICABLE TO ALL STATES EQUALLY, AND NOT BE DEVELOPED WITH EX POST FACTO EFFECT AT THIS TIME. LAW-MAKING SHOULD NOT BE DIRECTED SOLELY AGAINST A PARTICULAR STATE FOR A SPECIFIC PAST INCIDENT. SPECIFICALLY, THE UNITED STATES CONSIDERS THAT:

A. THE SECURITY COUNCIL OF THE UNITED NATIONS VESTED BY THE CHARTER OF THE UNITED NATIONS, WITH AUTHORITY TO CONSIDER THREATS TO WORLD PEACE AND ORDER, HAS CONSIDERED AND ADOPTED A RESOLUTION. THIS RESOLUTION DID NOT CONTAIN ANY SANCTION OR RECOMMENDATION FOR A SANCTION FOR THE ACTION ALREADY TAKEN. THOUGH THERE WAS DISCUSSION ON THE APPLICATION OF A SANCTION, THE SECURITY COUNCIL DECIDED INSTEAD TO CONDEMN THE ISRAELI ACTION AND TO SOLEMNLY WARN THAT SANCTIONS WOULD BE CONSIDERED IN THE LIMITED OFFICIAL USE
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EVENT OF ANY REPETITION. CONSEQUENTLY, THE QUESTION OF WHETHER OR NOT TO SANCTION ISRAEL FOR ITS ACT HAS ALREADY BEEN DECIDED BY THE SECURITY COUNCIL OF THE UNITED NATIONS.

THOUGH THE ASSEMBLY OF ICAO IS IN SOME RESPECTS A SOVEREIGN BODY AND THE SECURITY COUNCIL DOES NOT POSSESS EXCLUSIVE AUTHORITY TO LEVY SANCTIONS, THE ASSEMBLY'S POWERS AND RESPONSIBILITIES HAVE BEEN DETERMINED IN THE CHICAGO CONVENTION. THIS CONVENTION WAS ACCEPTED BY OUR PARENT ORGANIZATION, THE U.N. , AS OUR CHARTER. MOREOVER, IN ITS FORMAL AGREEMENT WITH THE U.N, ICAO HAS AGREED TO ASSIST THE SECURITY COUNCIL IN IMPLEMENTING ITS DECISIONS. ICAO FURTHER AGREED IN ASSEMBLY RESOLUTION A5-5 TO COOPERATE

WITH UN ORGANS. IN THE US VIEW THE ADOPTION OF SANCTIONS AGAINST ISRAEL WOULD CONSTITUTE NEITHER ASSISTANCE TO THE SECURITY COUNCIL IN THE IMPLEMENTATION OF ITS DECISIONS NOR WITH UN ORGANS.

IN THE SPECIFIC CASE BEFORE US THE SECURITY COUNCIL BY ITS WARNING QTE IF SUCH ACTS ARE REPEATED, THE COUNCIL WILL CONSIDER TAKING ADEQUATE STEPS OR MEASURES TO ENFORCE ITS RESOLUTIONS UNQTE HAS RETAINED FLEXIBILITY FOR ITS FUTURE ACTION.

B. THE COUNCIL OF ICAO HAS ALSO CONSIDERED THIS MATTER AND ADOPTED A RESOLUTION. IT ALSO DOES NOT ENCOMPASS SANCTIONS FOR THE ISRAELI ACTION. THE ICAO COUNCIL RESOLUTION WAS CAREFULLY DRAFTED TO CONFORM WITH THE SECURITY COUNCIL TEXT. THE ACTION BY THE COUNCIL OF ICAO, COUPLED WITH THE SECURITY COUNCIL RESOLUTION IS AN EXPECITIOUS AND ADEQUATE RESPONSE TO THE ISRAELI ACT.

C. THE RESOLUTIONS DO CALL FOR POSITIVE STEPS TO BE TAKEN TO SAFEGUARD CIVIL AVIATION AGAINST ACTIONS SUCH AS THOSE WHICH OCCURRED AUGUST 10. THIS CAN BE ACHIEVED ONLY BY PROSPECTIVE INTERNATIONAL LAW-MAKING APPLICABLE TO ALL STATES.

III. EXPULSION OF ISRAEL FROM ICAO

THE UNITED STATES IS MOST STRONGLY OPPOSED TO ANY EFFORT TO EXPEL ISRAEL FROM ICAO. THE U.S. POSITION IS BASED UPON THESE CONSIDERATIONS:

A. THE U.S. IS OPPOSED IN PRINCIPLE TO THE EXPULSION OF STATES FROM INTERNATIONAL ORGANIZATIONS. THE BEST AND IN FACT ONLY WAY TO WORLD ORDER IS BY LIMITED OFFICIAL USE
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CONSTANT DISCUSSION BETWEEN STATES. THE EXPULSION OF A STATE FROM THE UN OR ITS SPECIALIZED AGANCIES SUCH AS ICAO IS A SERIOUS BLOW TO WORLD ORDER SINCE IT DESTROYS THE MOST EFFECTIVE MEANS FOR ENCOURAGING THAT STATE TO CONDUCT ITSELF IN CONFORMITY WITH INTERNATIONAL STANDARDS.

B. THE EXPULSION OF ISRAEL FROM ICAO WOULD HAVE SERIOUS AVIATION CONSEQUENCES. THE STRATEGIC LOCATION OF ISRAEL PLACES ESPECIAL RESPONSIBILITY ON ISRAEL IN THE AVIATION COMMUNITY. ISRAEL IS PERFORMING MANY TECHNICAL AVIATION FUNCTIONS DAILY, AND ITS EXPULSION WOULD CREATE A BREACH IN THE CAREFULLY WOVEN FABRIC OF AERIAL NAVIGATION. THE REPORT OF THE INVESTIGATIVE COMMISSIONFORMED BY THE ICAO COUNCIL PURSUANT TO THE RESOLUTION OF THE 19TH EXTRAORDINARY ASSEMBLY, IN THE WAKE OF THE TRAGIC DESTRUCTION OF THE LIBYAN AIRLINER AND LOSS OF 108 LIVES, POINTED UP THE SERIOUS NEED FOR EFFECTIVE COMMUNICATION ON AERIAL NAVIGATION MATTERS IN THIS AREA. AS A CONSEQUENCE THE ICAO AIR NAVIGATION COMMISSION, PURSUANT TO A COUNCIL RESOLUTION, IS WORKING ON MEANS TO ADDRESS THIS SERIOUS PROBLEM. THE EXPULSION OF ISRAEL FROM ICAO

WOULD SERIOUSLY CURTAIL PROGRESS IN THIS AREA OF UNDENIABLE SIGNIFICANCE TO INTERNATIONAL CIVIL AVIATION.

C. ANY ACTION TO EXPEL ISRAEL FROM ICAO WOULD BE UNCONSTITUTIONAL.

(1) THE ONLY SANCTION GRANTED TO THE ASSEMBLY OF ICAO IS THE SUSPENSION OF VOTING POWER IN THE ASSEMBLY AND IN THE COUNCIL PROVIDED IN ARTICLE 88. THIS ACTION IS PREDICATED ON A FINDING, PURSUANT TO THE PROVISIONS OF CHAPTER XVIII OF THE CHICAGO CONVENTION, THAT THE STATE IS IN DEFAULT OF ITS OBLIGATIONS UNDER THAT CONVENTION. IN THIS REGARD WE NOTE THAT IN ITS RESOLUTION OF AUGUST 20 THE COUNCIL DID NOT REACH A QTE DECISION UNQTE UNDER CHAPTER XVIII BUT CHOSE TO STATE THAT IT QTE CONSIDERED UNQTE THAT VIOLATIONS HAD

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OCCURRED. THIS CAREFUL FORMULATION PRESUMABLY DRAFTED TO STOP SHORT OF FINAL COUNCIL DECISION AND ENABLED THE SPONSOR OF THE RESOLUTION, LEBANON, TO VOTE IN THE COUNCIL PROCEEDINGS. LEBANON COULD NOT OTHERWISE HAVE DONE SO UNDER CHAPTER XVIII AS A PARTY TO THE DISPUTE. CONSEQUENTLY, THE COUNCIL RESOLUTION CANNOT BE INVOKED BY THE ASSEMBLY TO IMPLEMENT THE ARTICLE 88 SANCTION. ANOTHER ARGUMENT THAT MAY BE USED IS TO INTERPRET ART 88 NARROWLY SO THAT ONLY VIOLATION OF THE SPECIFIC PROVISIONS CONTAINED IN CHAP XVIII SINCE ITS OPERATION HAS NOT BEEN FORMALLY INVOKED. THEREFORE ART 88 CANNOT BE USED AGAINST ISRAEL IN THIS INSTANCE. (NOTE, HOWEVER, THIS ARGUMENT TENDS TO SEVERELY LIMIT ICAO ENFORCEMENT MACHINERY.)

(2) A STATE CAN BE EXPELLED BY ICAO UNDER THE PROVISIONS OF ARTICLE 93(BIS). HOWEVER, EXPULSION IS PREDICATED ON DEBARRMENT FROM MEMBERSHIP IN SPECIALIZED AGENCIES OF THE UN OR EXPULSION FROM THE UN. THESE FIRST

STEPS MUST BE DECIDED BY THE GENERAL ASSEMBLY OF THE UN.
THIS ACTION HAS NOT BEEN TAKEN WITH RESPECT TO ISRAEL.
THEREFORE, THE PROVISIONS OF ARTICLE 93(BIS) CANNOT BE
INVOKED.

(3) ACTION OF EXPULSION OUTSIDE OF ARTICLE 93(BIS)
CANNOT BE TAKEN LEGALLY BY THE ASSEMBLY. THE CHICAGO
CONVENTION DELIMITS THE ASSEMBLY'S POWER. (SEE DISCUSSION
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RE 49(C) AT IV (B) (5).) THERE IS NO OTHER PROVISION IN
THE CONVENTION UPON WHICH THE ASSEMBLY CAN RELY TO
JUSTIFY EXPULSION.

(4) LOOKING OUTSIDE OF THE CHICAGO CONVENTION, THE
CUSTOMARY INTERNATIONAL LAW ON TREATY OBLIGATIONS IS
CODIFIED IN THE VIENNA CONVENTION ON THE LAW OF TREATIES.
(THIS TREATY IS NOT IN FORCE BUT HAS BEEN GIVEN GREAT
WEIGHT IN PREVIOUS ICAO MEETINGS). SPECIFICALLY,
ARTICLE 60 TREATS THE ISSUE OF TERMINATION OR SUSPENSION
OF A TREATY AS A CONSEQUENCE OF ITS BREACH. IF ISRAEL
WERE CHARGED WITH A QTE MATERIAL BREACH UNQTE OF THE
CHICAGO CONVENTION, TERMINATION OR SUSPENSION COULD BE
INVOKED ONLY IN THE FOLLOWING MANNER ACCORDING TO THE
VIENNA CONVENTION:

(A) BY UNANIMOUS AGREEMENT BY ALL OTHER PARTIES TO
CHICAGO (VIENNA - ARTICLE 60(A)(2)). THIS IS IMPOSSIBLE
SINCE ALL PARTIES TO ICAO WILL NOT BE PRESENT, EVEN
ASSUMING A CONSENSUS.

(B) A STATE QTE SPECIALLY AFFECTED UNQTE CAN USE
THE BREACH TO SUSPEND A TREATY (VIENNA - ARTICLE 60 (2)(B)).
HOWEVER, EVEN THIS ACTION IS SUBJECT TO RESTRICTIONS IN
IMPLEMENTATION. THESE RESTRICTIONS INCLUDE A THREE-
MONTH DELAY TO ALLOW OTHER PARTIES TO OBJECT, AVAIL
THEMSELVES OF RECOURSE TO ARBITRATION, ETC. (VIENNA-
ARTICLE 65).

(C) OTHER PARTIES TO A TREATY CAN INVOKE A BREACH
AS GROUNDS FOR SUSPENSION OR TERMINATION OF A TREATY IF
THE TREATY IS SUCH THAT A BREACH BY ONE PARTY QTE RADICALLY
CHANGES THE POSITION OF EVERY PARTY. UNQTE (VIENNA -
ARTICLE 60(2)(C)). THE ISOLATED ACT OF ISRAEL ON AUGUST 10
IS NOT THAT SORT OF BREACH. IN ANY EVENT, THE PROVISIONS
NOTED ABOVE IN (B) AND (C) DO NOT APPLY TO MULTI-STATE
ACTION, BUT UNILATERAL ACTION AGAINST THE DEFAULTING STATE
BY ANOTHER STATE.

(D) THE U.S. IS ALSO OPPOSED TO THE ADOPTION OF
ANY AMENDMENT TO THE CHICAGO CONVENTION WHICH WOULD
EXPLICITLY CALL FOR THE EXPULSION OF ISRAEL. THE PURPOSE
OF INTERNATIONAL LAW MAKING SHOULD BE TO DEVELOP NORMS
FOR CONDUCT OF ALL STATES. TO SINGLE OUT A STATE AND
CREATE THE LAW ON AN AD HOC BASIS CANNOT BE RECONCILED
WITH THIS PURPOSE.
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IV. THE DEBARRMENT OF ISRAEL BY ADOPTION OF
A RESOLUTION BY THE ASSEMBLY

THE UNITED STATES IS STRONGLY OPPOSED TO THE ADOPTION OF A RESOLUTION WHICH WOULD BAR ISRAEL FROM CERTAIN ICAO MEETINGS. THE ARGUMENT IN SECTION II OF THIS PAPER GENERALLY APPLIES HERE AS WELL. WITHOUT REPEATING THOSE ARGUMENTS, THE FOLLOWING POINTS ARE CONSIDERED TO BE SIGNIFICANT:

(A) THE RESOLUTIONS OF THE UNGO AND THE ICAO COUNCIL BOTH CALL FOR PROSPECTIVE ACTION (SEE II(A)(B) ABOVE).

(B) THE USE OF AN ASSEMBLY RESOLUTION TO PERFORM THIS FUNCTION WOULD BE UNCONSTITUTIONAL:

(1) THE POWERS OF THE ASSEMBLY ARE SET FORTH IN THE CHICAGO CONVENTION. IN ARTICLE 49(I) IT IS ALLOWED TO DEAL WITH ANY MATTER INVOLVING INTERNATIONAL CIVIL AVIATION NOT SPECIFICALLY ASSIGNED TO THE COUNCIL. THE DETERMINATION OF INFRACTIONS OF THE CONVENTION IS A MANDATORY FUNCTION ASSIGNED TO THE COUNCIL IN ARTICLE 54(J). IT COULD BE CONSIDERED A USURPATION OF THE COUNCIL'S FUNCTIONS IN ARTICLE 54 AND IN CHAPTER XVIII IF THE ASSEMBLY ACTS BEYOND ITS OWN SPECIFIED FUNCTIONS IN THE CONVENTION. THE ASSEMBLY FUNCTION IS DESCRIBED IN ARTICLE 88, WHICH DOES NOT CONTAIN AUTHORITY FOR THE ASSEMBLY TO RESTRICT A STATE'S RIGHTS UNDER THE CHICAGO CONVENTION.

(2) SUCH A RESTRICTION CONSTITUTES A SUSPENSION OF PART OF A TREATY SINCE IT ELIMINATES A RIGHT A STATE WOULD HAVE ABSENT THE RESTRICTION. THUS, THE RULE OF CUSTOMARY LAW REFLECTED IN ARTICLE 60 OF THE VIENNA CONVENTION WOULD BE APPLICABLE. ASSEMBLY ACTION TAKEN ONLY BY A MAJORITY OF STATES IS NOT CONSISTENT WITH ARTICLE 60 OF THAT CONVENTION.

(3) THIS LEGAL ARGUMENT IS PREDICATED ON THE DIVISION OF AUTHORITY BETWEEN THE COUNCIL AND THE ASSEMBLY RELATING TO INTERPRETATION OF THE CONVENTION AND SITUATIONS INVOLVING INFRACTIONS OF ITS PROVISIONS AND SUBSEQUENT RIGHTS OF APPEAL. THE RESOLUTIONS ADOPTED BY THE ASSEMBLY RELATING TO SOUTH AFRICA AND PORTUGAL ARE THEREFORE NOT SUSCEPTIBLE TO THIS LEGAL ARGUMENT. PORTUGAL AND SOUTH

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AFRICA WERE NOT ALLEGING TO HAVE COMMITTED AN ACT IN CONTRAVENTION OF A PROVISION OF CHICAGO. THUS, THE ACCEPTANCE OF THIS ARGUMENT DOES NOT IMPLY THAT THE PREVIOUS ASSEMBLY ACTIONS WERE SIMILARLY ULTRA VIRIS.

(4) IT SHOULD BE NOTED, HOWEVER, THAT THE PREVIOUS

RESOLUTIONS WERE ADOPTED PURSUANT TO A POSITIVE MANDATE BY THE GENERAL ASSEMBLY OF THE UN CALLING UPON SPECIALIZED AGENCIES TO TAKE SUCH ACTION. (G.A. RESOLUTIONS 2980 (XXVII) AND 2874 (XXVI)).

(5) AS NOTED IN IV(B)(1) ABOVE, THE POWERS OF THE ASSEMBLY ARE SET FORTH IN THE CHICAGO CONVENTION. IN ARTICLE 49(C) IT IS REQUIRED TO DECIDE ON ANY MATTER REFERRED TO IT BY THE ICAO COUNCIL. IT MAY BE ARGUED THAT THIS WAS IN FACT THE NATURE OF THE COUNCIL ACTION ON AUGUST 20. HOWEVER, ARTICLE 54(B) REQUIRES THE COUNCIL TO DISCHARGE THOSE DUTIES AND OBLIGATIONS LAID ON IT BY THE CHICAGO CONVENTION, AND ONE SUCH DUTY IS TO DECIDE DISPUTES OF THIS TYPE PURSUANT TO THE PROVISIONS OF ARTICLE 84. THEREFORE, A COUNCIL DELEGATION OF ITS DECISIONAL POWER WOULD HAVE BEEN AN ULTRA VIRES ACT BY THE COUNCIL.

(C) THE US DOES NOT VIEW THE ICAO COUNCIL ACTION OF AUGUST 20 TO BE A DECISION UNDER THE TERMS OF CHAPTER XVIII. ON THE OTHER HAND, SHOULD THE ASSEMBLY HOLD THAT IT WAS, THIS DETERMINATION WOULD TRIGGER THE APPELATE PROVISION OF ARTICLE 84, MEANING THAT ISRAEL WOULD HAVE UNTIL OCTOBER 10 TO FILE NOTICE OF AN APPEAL TO AN AD HOC ARBITRAL TRIBUNAL OF PERMANENT COURT OF INTERNATIONAL JUSTICE. LASTLY, THE ASSEMBLY ITSELF HAS NO POWER UNDER THE CHICAGO CONVENTION TO EXPEL OR DICTATE OTHER SANCTION ACTION IN THE CASE AT HAND.

(D) THE INTERESTS OF ICAO ARE BEST SERVED WITH THE BROADEST POSSIBLE MEMBERSHIP. (SEE III(A) ABOVE).
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